

Dissenting Views to H.Res. 499,
Directing the Justice Department to Transmit All
Documentation About the Leak of Valerie Plame's
Name and Undercover Status

We strongly dissent from the majority's unfavorable reporting of H.Res. 499. We are shocked by this Committee's abdication of its oversight role of the Department of Justice (DOJ).

For months we have been aware of a shocking and shameful incident. In an effort to build the case for preemptive war, the President declared in his 2003 State of the Union address that Iraq had tried to buy uranium from Niger, even after former Ambassador Joseph Wilson, IV informed the Administration this was not true. In an attempt to intimidate Wilson and others who might tell the truth about the war, high ranking administration officials started shopping around classified information to reporters – the fact that his wife is a CIA operative, along with her name.

The leak of Valerie Plame's name and undercover status jeopardized not only her life, but the lives of all those she worked with over decades of service to our country. We can think of very few situations that more strongly call for Congressional oversight. This incident needs our immediate attention not only to get to the bottom of who leaked Plame's status, but to determine whether the White House and the Justice Department properly guarded this information in the first place and took appropriate steps to remedy the leak in its aftermath.

1. History of the Leak

In February of 2002, former ambassador Joseph Wilson, IV, was sent to Niger by the CIA, on behalf of the Bush administration, to investigate claims that Iraq was attempting to buy yellow cake uranium in that country.¹ When Wilson returned, he informed the CIA and the State Department that the claims were unsubstantiated.²

Nearly a year later, the President stated that Iraq tried to purchase uranium in Africa during his State of the Union address: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."³ In response, Wilson published an op-ed in July of 2003 publicizing his findings, or lack thereof.⁴ Approximately two weeks later, journalist Robert Novak used his widely syndicated column to defend the Administration's choice

¹Mike Allen and Dana Priest, *Bush Administration is Focus of Inquiry*, WASH. POST, Sept. 28, 2003 at A1. Wilson was a diplomat for 22 years and served as President Clinton's director of African affairs on the National Security Council.

² *Id.*

³President George W. Bush, State of the Union, (January 28, 2003).

⁴Joseph C. Wilson, IV, *What I didn't Find in Africa*, July 6, 2003.

to invade Iraq and call Wilson's credibility into question.⁵ Painting Wilson's assignment to Niger as a favor to Wilson's wife, Novak stated, "Wilson never worked for the CIA, but his wife, Valerie Plame, is an Agency operative on weapons of mass destruction. Two senior administration officials told me Wilson's wife suggested sending him to Niger to investigate..."⁶ It was soon revealed that those administration officials called at least six members of the press to disseminate Plame's undercover identity.⁷ Inside sources and most commentators suspect that the motivation was "revenge" for publicly discrediting the President's main justification for invading Iraq and an attempt to preemptively silence other whistle blowers.⁸

The CIA responded immediately, and contacted the DOJ four times in the span of three weeks to notify the Department that the disclosure of Plame's name and status probably violated the law and to request an investigation.⁹ On September 29, over a month after the CIA first notified the DOJ, the Department confirmed that the FBI would be investigating the leak.

At first, the President appeared committed to cooperating with the investigation and tracing the leak to its source: "...if there is a leak out of my administration, I want to know who it is...I welcome the investigation."¹⁰ However, the administration's tone changed quickly. No longer making blanket statements about the innocence of his staff, the President turned to narrow legalisms, instead claiming that no one had technically broken the law.¹¹ Eventually the President appeared completely resigned to the idea that the investigation would be fruitless: "I don't know

⁵Robert Novak, *Mission to Niger*, July 14, 2003.

⁶*Id.*

⁷*See supra* note 2.

⁸David Johnston, "Top Bush Aide is Questioned in CIA Leak," N.Y. Times, Feb. 10, 2004 at A1 ("...prosecutors have cited evidence that White House officials were extremely upset by Mr. Wilson's article and were angry at the CIA for sending him to Africa..."); Mike Allen and Dana Priest, "Bush Administration is Focus of Inquiry," Wash. Post, Sept. 28, 2003 at A1 ("Clearly, it was meant purely and simply for revenge.").

⁹Letter from Stanley M. Mosowitz, Director of Congressional Affairs to John Conyers, Jr., Ranking Member of the House Judiciary Committee, (Jan. 30, 2004) *available at* http://www.house.gov/judiciary_democrats/cialeakinforesp13004.pdf.

¹⁰Dana Milbank and Susan Schmidt, *Justice Department Launches Criminal Probe of Leak*, WASH. POST, Oct. 1, 2003 at A1.

¹¹Dana Milbank and Mike Allen, *Outside Probe of Leaks Is Favored*, WASH. POST, Oct. 2, 2003.

if we're going to find out the senior administration official...Now this is a large administration, and there's a lot of senior officials. I don't have any idea."¹²

These statements appeared to effect the progress of the investigation. An FBI official commented that "It wouldn't surprise me if we went a little bit slower on this one just because it is so high profile. This will get scrutinized at our headquarters and at Justice in a way that lesser, routine investigations wouldn't."¹³ That prophecy was fulfilled, and in the words of a senior White House official the investigation was stalled: "We have let the earth-movers roll in over this one."¹⁴

This lack of outrage by the Administration and lack of zeal on the part of the Justice Department were not the only disconcerting factors in the investigation. Instead, the first three months of the investigation were fraught with apparent conflicts of interests and procedural irregularities.

On December 31, 2003, the Attorney General recused himself from the investigation and Patrick Fitzgerald, the U.S. Attorney in Chicago, was appointed to head the efforts. Recent press reports confirm that White House staff are being interviewed by investigators, although many are refusing to sign a waiver of their journalistic privilege, which would allow the press to disclose who among the Administration leaked Plame's undercover status.¹⁵ It has also been confirmed that investigators are presenting evidence to a grand jury. Press reports include Ari Fleischer, Karl Rove, Scott McClellan, Mary Matalin and other Presidential and Vice Presidential staffers among those who have testified.¹⁶ It is also an open question whether the Administration Officials are invoking their Fifth Amendment right against self-incrimination.

There are several instances of personal bias in this situation that are more than apparent. For example, Karl Rove, political advisor to the President, was named by several sources as an instigator of the leak.¹⁷ He worked on Attorney General Ashcroft's campaigns throughout the

¹²Dana Milbank, 'No Idea' About Leak Inquiry, WASH. POST, Oct. 8, 2003.

¹³Richard Stevenson and Eric Lichtblau, *White House Looks to Manage Fallout Over CIA Leak Inquiry*, N.Y. TIMES, Oct. 2, 2003.

¹⁴James Harding, *The Agent's Tale*, FINANCIAL TIMES, Dec. 5, 2003.

¹⁵Mike Allen and Susan Schmidt, *Bush Aides Testify in Leak Probe*, WASH. POST, Feb. 10, 2004 at A1.

¹⁶*Id.*; Johnston, *supra* note 8.

¹⁷Joseph Wilson, *Nightline* (ABC television broadcast, Sept. 30, 2003) ("I just got off the phone with Karl Rove. He tells me your wife is fair fame."); NEWSWEEK, Oct. 13, 2003

1980's and 90's raking in nearly three-quarters of a million dollars in fees.¹⁸ While at first blush, it might appear that the Attorney General wouldn't be involved with the investigation on a regular basis, Associate Deputy Attorney General Christopher Wray testified before the Senate Judiciary Committee that he regularly briefs the AG on the investigation.¹⁹ These conflicts existed not only between the Attorney General and likely targets of the investigation, but between lower level investigators and the President. Robert McCallum, the Assistant Attorney General who initially oversaw the investigation is an old friend of the President's from Yale.²⁰ Also, James Comey, Jr., the Deputy Attorney General and in charge of the investigation since Attorney General Ashcroft recused himself, is extremely close with Mr. Fitzgerald. In fact, Mr. Fitzgerald is the godfather of Mr. Comey's child.²¹

There have also been a number of procedural irregularities that beg the question of whether the investigation has always been pursued with due diligence. For example, the DOJ waited three days before notifying the White House of the Investigation, and the White House in turn waited 11 hours before asking all staff to preserve any evidence.²² What evidence that employees have turned over have been screened for "relevance" by White House counsel, perhaps filtering out critical information.²³ And as to the pace of the investigation, FBI sources were quoted as saying that the Department was "going a bit slower on this one because it is so high-profile."²⁴ For many, all these factors have worked in tandem to create at the very least the appearance of impropriety warranting some sort of independent investigation.

This litany of factors has led nearly all commentators not associated with the Administration nor the Republican party to call on Attorney General Ashcroft to appoint a special counsel. Federal regulations provide that a special counsel should be appointed to a criminal

(reporting that Chris Matthews of MSNBC's *Hardball* was the journalist contacted by Rove.)

¹⁸Michael Duffy, *Leaking With a Vengeance*, TIME, Oct. 5, 2003.

¹⁹Eric Lichtblau, N.Y. TIMES, Oct. 22, 2003

²⁰Richard B. Schmitt and Edwin Chen, *Leak Inquiry Embarks on a Long Road*, L.A. TIMES, Oct. 2, 2003 at 14.

²¹David Von Drehle and Dan Eggen, *Head of Leak Probe is Called Relentless*, WASH. POST, Jan. 1, 2004.

²²Editorial, *Investigating Leaks*, N.Y. TIMES, Oct. 2, 2003.

²³Richard Stevenson and Eric Lichtblau, *Leaker May Remain Elusive Bush Suggests*, N.Y. TIMES, Oct. 8, 2003.

²⁴Richard Stevenson and Eric Lichtblau, *Attorney General is Closely Linked to Inquiry Figures*, N.Y. TIMES, Oct. 2, 2003.

investigation when there is a conflict of interest within the DOJ and public interest would served by an impartial prosecutor.²⁵ Special counsels must come from outside the federal government,²⁶ ensuring that they are not beholden to anyone they may have to investigate. Once appointed, a special counsel gets extraordinary leeway to conduct an investigation as he or she sees fit. For example, a special counsel is not subject to day-to-day oversight by the DOJ,²⁷ and in fact can only be dismissed for cause.²⁸ Perhaps most importantly, once a special counsel makes a recommendation to the Attorney General, the latter must formally explain his reasons if he chooses not to follow it.²⁹ Because Mr. Fitzgerald is not a special counsel under the regulations, nor can he be since he comes from within the federal government, none of these safeguards exist.

Despite repeated requests for a special counsel from members of both the House and the Senate, none has been appointed to date. In fact, all attempts by Democratic members of this Committee to exercise their oversight authority in less intrusive manners than a Resolution of Inquiry have failed. On September 29, 2003, ranking member John Conyers, Jr. requested a staff briefing from the DOJ.³⁰ Attorney General Ashcroft did not respond. On October 30, 2003, every democratic member requested a full committee hearing from Chairman Sensenbrenner, which was denied.³¹ As these intermediate options were ruled out, this Resolution of Inquiry became ever more appropriate.

2. Whoever Leaked the Information Most Likely Violated Federal Law

There are at least two possible federal crimes that may have been committed by whoever in the Administration leaked Plame's undercover CIA status. First, the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421) provides for fines and 10 years imprisonment for anyone who: 1) intentionally discloses information identifying an undercover agent, 2) knowing that the

²⁵28 C.F.R. 600.1.

²⁶28 C.F.R. 600.3.

²⁷28 C.F.R. 600.7(b).

²⁸28 C.F.R. 600.7(d).

²⁹28 C.F.R. 600.9(a)(3).

³⁰Letter from John Conyers, Jr., ranking member of House Judiciary Committee to Attorney General John D. Ashcroft, (Sept. 29, 2003) *available at* http://www.house.gov/judiciary_democrats/agleakcianameltr92903.pdf.

³¹Letter from John Conyers, Jr., ranking member of the House Judiciary Committee, to the Honorable F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee (Oct. 30, 2003) *available at* http://www.house.gov/judiciary_democrats/cialeakltr103003.pdf.

disclosure will reveal the agent as such, when 3) the United States is taking affirmative measures to conceal the agent's intelligence relationship to the U.S.

Administration Officials may also have violated 18 U.S.C. 793, which prohibits the gathering, transmitting or losing defense information. This law prohibits communicating national defense information that the possessor has reason to believe could be used to the injury of the United States.³² It also criminalizes the leaking of information relating to the national defense through gross negligence,³³ and imposes an affirmative duty to report a leak when discovered.³⁴ It is important to note that information need only "relate to" the national defense, and that the leaker need not intentionally share the information to violate this provision.

3. The Majority's Concerns Are Unfounded in Law or Precedent

- A. This request would not interfere with the Justice Department's ongoing criminal investigation.

³²“(d) Whoever, lawfully having possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully . . . causes [or attempts to cause] to be communicated, delivered, or transmitted . . . to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts [to do so] . . . to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or...”

³³“(f) Whoever, being entrusted with or having lawful possession or control of any . . . information, relating to the national defense,

(1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or...”

³⁴“(2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer...” may be imprisoned for up to ten years and be subject to a fine.

The majority argued during the markup that the DOJ is handling the investigation properly and that Congressional intervention at this point would jeopardize the criminal investigation. Despite claims to the contrary, there is long standing precedent for this committee to conduct oversight concurrently with an ongoing DOJ investigation:

- In 1997 the Committee held hearings on campaign improprieties in the 1996 presidential election. The Justice Department was conducting its own investigation and determining whether an independent counsel was warranted. In addition to taking testimony from Attorney General Janet Reno, the Committee requested all documents, including deliberative memoranda, relating to the appointment of a special counsel. The DOJ provided many of these documents to the Committee.³⁵
- In 1995, the Subcommittee on Crime heard 12 days of testimony as part of a congressional investigation to federal actions at Waco, with soldiers, officers, ATF, FBI and Treasury Department officials testifying. The full Committee went on to take testimony from the Attorney General, the Director of the FBI and Davidian victims. Numerous criminal and civil cases relating to the Branch Davidians were pending at the time of the hearing.³⁶
- In 1990-92, the Committee investigated whether the Justice Department helped run INSLAW, a small computer company into insolvency. The Committee subpoenaed documents, heard testimony from government officials and federal judges while an independent counsel investigated criminal allegations.³⁷

In fact, congressional committees have long been investigating matters that are under criminal review by the executive branch. For example:

- In 1997-99, the Senate Governmental Affairs Committee investigated campaign financing while the FBI and the DOJ's Campaign Finance Task Force was conducting a criminal investigation. The Committee subpoenaed FBI agents, Task Force attorneys, and obtained

³⁵*Oversight of the Department of Justice: Hearing Before the House Committee on the Judiciary*, 105th Cong. (1997); Letter from the Honorable Henry J. Hyde, Chairman of the House Committee on the Judiciary to Attorney General Janet Reno (July 24, 1998) *available at* <http://www.house.gov/judiciary/072498.htm>; Letter from the Honorable Henry J. Hyde, Chairman of the House Committee on the Judiciary to Attorney General Janet Reno (Apr. 5, 2000) *available at* <http://www.house.gov/judiciary/b5b88a00.pdf>.

³⁶*Federal Actions at Waco, Texas: Hearing Before the Subcommittee on Crime, House Committee on the Judiciary*, 104th Cong. (1995).

³⁷*The INSLAW Affair*, H.R. REP. NO. 102-857 (1992).

a number of documents including the notes of special agents, draft affidavits, notes of the Task Force supervisor and internal memos.³⁸

- In 1997-2000, the House Government Reform Committee conducted its own investigation into possible campaign improprieties by the Clinton Administration and the Democratic party. The Committee had Attorney General Janet Reno testify during hearings and subpoenaed deliberative memos from FBI Director Louis Freeh and Campaign Task Force Leader Charles LaBella. When Reno refused to comply, the Committee held her in contempt. Eventually the Committee received all the documentation it requested.³⁹
- In 1999-2000, the House Government Reform Committee investigated federal law enforcement actions at Waco. The Committee subpoenaed FBI investigative files, interviewed 20 FBI agents and reviewed over a million documents. At the same time, former Senator Danforth was investigating as a Special Counsel.⁴⁰
- In 2000-2001, the House Government Reform Committee investigated President Clinton's use of pardons. The majority issued 153 requests and subpoenas for documents, and ultimately received over 25,000 pages. U.S. Attorney Mary Jo White was conducting her own criminal investigation at the time.⁴¹
- In 2000-2001, the House Government Reform Committee investigated the Boston FBI field office's use of confidential informants. The Committee subpoenaed FBI files, direct

³⁸See, e.g., *Campaign Finance Investigation: Hearing before the Senate Governmental Affairs Committee*, 105th Cong. (1997).

³⁹See for example, *Hearing on John Huang and the Riady Family before the House Government Reform Committee*, 106th Cong. (1999); see also, *Investigation into Allegations of Justice Department Misconduct in New England – Volume 1 Before the Committee on Government Reform, House of Representatives*, 107th Cong., 1st and 2nd Sess. (2001-02) (testimony of Morton Rosenberg, Congressional Research Service, American Law Division) (discussing the history of the House Government Reform Committee's investigation of campaign finance violations).

⁴⁰*Tragedy at Waco: New Evidence Examined*, H.R. REP. NO. 106-1037 (2000).

⁴¹*Justice Undone: Clemency Decisions in the Clinton White House*, H.R. REP. NO. 107-454 (2002).

evidence, such as wiretap logs, and deliberative memos. At the time of this investigation, an FBI agent, John Connelly, was under indictment.⁴²

In fact, in four years, the Clinton administration turned over 1.2 million pages of documents—including criminal investigators' files, evidence, and deliberative memoranda—to the House Government Reform Committee alone despite ongoing criminal investigations.⁴³ There are scores of examples from other Committees also:

- For example, in 2002 the Senate Governmental Affairs Committee investigated the collapse of Enron Corporation and its outside auditor Arthur Andersen while the SEC investigated possible criminal violations. The Committee took testimony from several executives during hearings. In all, there were 30 hearings within the House and Senate between 2001 and 2003.⁴⁴
- In 2002, the House Energy and Commerce Committee investigated Martha Stewart for insider trading allegations involving ImClone stock while Martha Stewart and ImClone officials were under investigation by the DOJ.⁴⁵
- In 2002, the House Financial Services Committee investigated the WorldCom scandal while criminal and civil cases were pending. During hearings, analysts and the chairman of the board testified, while other executives refused to testify citing the 5th Amendment.⁴⁶

Finally, the General Accounting Office (GAO) has traditionally conducted investigations while parts of the administration were pursuing criminal investigations. For example:

⁴²*Everything Secret Degenerates: The FBI's Use of Murderers as Informants*, H.R. REP. NO. 108-414 (2003).

⁴³http://www.house.gov/reform/min/pdfs/pdf_com/pdf_clinton_doc_prodoc_rep.pdf

⁴⁴See e.g., *The Role of the Board of Directors in Enron's Collapse: Hearing before the Permanent Subcommittee on Investigations, Senate Governmental Affairs Committee*, 107th Cong. (2002).

⁴⁵*An Inquiry into the Imclone Cancer Drug Story: Hearing before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce*, 107th Cong. (2002).

⁴⁶*Wrong Numbers: The Accounting Problems at Worldcom: Hearing Before the House Committee on Financial Services*, 107th Cong. (2002).

- In 1998-2001, the GAO investigated the actions of FBI investigators in the Wen Ho Lee espionage case. Lee was under investigation by the FBI from 1996 until his indictment in 1999.⁴⁷
- In 1999-2000, the GAO investigated the Waco incident while DOJ Special Counsel Danforth was still conducting his investigation.⁴⁸
- In 1994-96, the GAO investigated the White House Travel Office under the Clinton administration while criminal investigations were being conducted by the DOJ, the Internal Revenue Service, the Treasury Department Inspector General and the Office of Professional Responsibility.⁴⁹

Because of this long precedent of dual-track investigations, we do not believe the limited congressional oversight of the type envisioned by H.Res. 499 would jeopardize DOJ efforts to investigate this matter. However, in an effort to create a mutually agreeable solution, Ms. Jackson Lee offered an amendment that would limit H. Res. 499's effect to "only those documents that the Federal official appointed to carry out the criminal investigation of the Department of Justice into the disclosure of Ms. Valerie Plame as an employee of the Central Intelligence Agency determines would not interfere with the investigation." In effect, it would have vested Mr. Fitzgerald with the authority and flexibility to determine what would interfere with his own investigation instead of ruling out all Plame-related documents whether intrusive on the criminal investigation or not. The amendment was defeated by the majority.

This sort of delegation is not uncommon. Since the creation of the Resolution of Inquiry, the House has given certain respondents the latitude to screen their response when appropriate, such as when the request implicated military concerns or might be against the public interest.⁵⁰ Allowing the special prosecutor in this situation the same flexibility would not have created an

⁴⁷*FBI Official's Congressional Testimony Was Inaccurate Because He Failed to Present Certain Information That Had Been Made Available to Him About the Wen Ho Lee Investigation*, General Accounting Office, GAO-01-869R, June 28, 2001.

⁴⁸*Department of Defense: Military Assistance During the Branch Davidian Incident*, General Accounting Office, NSIAD-00-240R, Aug. 21, 2000; *Department of Defense: Military Assistance Provided at Branch Davidian Incident*, General Accounting Office, NSIAD/OSI-99-133, Aug. 26, 1999.

⁴⁹*White House Travel Office*, General Accounting Office, AIMD-96-138R, Sept. 18, 1996; *White House Travel Office Review*, General Accounting Office, T-GGD-96-33, Oct. 24, 1995.

⁵⁰Louis Fisher, *House Resolutions of Inquiry*, Congressional Research Service, May 12, 2003 at 7-10.

unbearable burden any more than in those situations, especially considering in what high regard Mr. Fitzgerald is held in. As Chairman Sensenbrenner stated, “Mr. Fitzgerald is a man of unimpeachable integrity.” It is therefore unclear why doesn’t trust his judgment in determining what would interfere with his investigation.

- B. This resolution does not violate Federal Rule of Criminal Procedure 6(e)’s requirement of grand jury secrecy.

The majority also argued that the resolution would violate grand secrecy requirements.

Federal Rule of Criminal Procedure 6(e) prohibits the disclosure of a “matter occurring before a grand jury.”⁵¹ However, as the DOJ’s own *Federal Grand Jury Practice* manual explains,

Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but only information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury...*In short, to come within the Rule 6(e) secrecy prohibition, the material in question must ‘reveal some secret aspect of the inner workings of the grand jury.’*⁵²

Material created independently of the grand jury has long been held to be outside of the grand jury secrecy rules.⁵³ In particular, investigative material gathered by law enforcement agents instead of a grand jury has repeatedly been found to be outside of Rule 6(e).⁵⁴ That

⁵¹FED. R. CRIM. P. 6(e)(2).

⁵² “Federal Grand Jury Practice,” Office of Legal Education, Executive Office for United States Attorneys, Department of Justice, August 2000 at 40 (emphasis added) (citing *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997); *Anaya v. United States*, 815 F.2d 1373, 1379 (10th Cir. 1987); *Fund for Constitutional Gov’t v. National Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 217 (5th Cir. 1980); *United States v. Stanford*, 589 F.2d 285, 291 (7th Cir. 1978); *United States Industries, Inc. v. United States Dist. Court*, 345 F.2d 18, 21-22, (9th Cir. 1965); *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960)).

⁵³*Id.*

⁵⁴*In re Grand Jury Subpoena*, 920 F.2d 235, 242-43 (4th Cir. 1990); *Anaya v. U.S.*, 815 F.2d 1373, 1379-80 (10th Cir. 1987); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3rd Cir.

information is gathered with an “eye toward ultimate use in a grand jury proceeding” does not invoke secrecy protections.⁵⁵ As long as the investigative information was not collected at the direction of a grand jury nor is presented in a manner that reveals what took place in front of the grand jury, disclosure is proper.⁵⁶ In fact, DOJ disclosure of this material would continue the long history of its routine disclosure of criminal investigative information in response to pressing Congressional inquiries such as this.⁵⁷

The documentation requested by H. Res. 499 would not betray the “inner workings of the grand jury.” The records of communications about Ms. Plame—phone logs, copies of emails, internal White House memoranda—were created completely independently of the grand jury process and are therefore not protected by Rule 6(e). That some of these records may have been presented to the grand jury by Mr. Fitzgerald’s prosecutorial team does not make them inaccessible either. This resolution asked for all documentation relating to the leak; and if all documentation were turned over to the House without any signification of which documents were actually presented to the grand jury, Rule 6(e) protections would remain intact.

In that this resolution incidentally requested any materials that would reveal grand jury information, such as prosecutorial documents discussing grand jury strategy, or compilations of evidence created by the prosecution, we did not expect disclosure. As with any request for information, we expected the Department of Justice to comply with longstanding criminal procedure rules. To clarify this and to cure any potential conflicts with Rule 6(e), Ms. Jackson Lee offered an amendment that would exempt “those documents the transmission of which [would] violate Rule 6(e) of Federal Rule of Criminal Procedure as determined by the Federal officer appointed to carry out the criminal investigation...” The amendment failed on a party-line vote of 8-17.

4. Conclusion

1982); *U.S. v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960).

⁵⁵Catania, 682 F.2d at 64.

⁵⁶*See supra* note 32.

⁵⁷Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, Congressional Research Service, Apr. 7, 1995 at 29-31. *See also*, *Investigation into Allegations of Justice Department Misconduct in New England—Volume 1 Before the Committee on Government Reform, House of Representatives*, 107th Cong., 1st and 2nd Sess.(2001-02) (testimony of Morton Rosenberg, Congressional Research Service, American Law Division) (listing 18 distinct Congressional investigations that acquired criminal files from the DOJ).

This leak should be troubling to every member of this Committee, Republican and Democrat. It compromises our national security, our intelligence assets and reeks of a Nixon-era “enemies list.” This action flies in the face of the President’s promise to “change the tone” in Washington; it is unethical and most likely criminal.

There is a deafening silence from this Congress despite substantial evidence of stonewalling by the Justice Department. When it came to 30 year old land deals in Arkansas, the suicide of Vince Foster, or a private sexual affair, this Congress had an insatiable appetite for investigation. Now when it comes to the disclosure of national security secrets by high ranking White House officials, there is a sudden lack of appetite for fulfilling our constitutional oversight responsibility. That is a shame.

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Jerrold Nadler
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